

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2002

4
5 (Submitted: October 28, 2002

Decided: July 14, 2003)

6 Docket No. 02-6257

7 - - - - -
8 WILLIAM BURRUS, President, American Postal Workers Union, AFL-
9 CIO, and AMERICAN POSTAL WORKERS UNION, AFL-CIO,

10
11 Plaintiffs-Appellees,

12 - v. -

13 ANTHONY VEGLIANTE, Vice President, Labor Relations, United States
14 Postal Service, ELAINE KAPLAN, Special Counsel, U.S. Merit
15 Systems Protection Board, KAY COLES JAMES, Director, U.S. Office
16 of Personnel Management, U.S. OFFICE OF PERSONNEL MANAGEMENT, and
17 UNITED STATES POSTAL SERVICE,

18 Defendants-Appellants.

19 - - - - -
20 B e f o r e: WINTER and CABRANES, Circuit Judges, and JONES,*
21 District Judge.

22
23 Various federal officials, the United States Office of
24 Personnel Management, and the United States Postal Service appeal
25 from the denial of their motion for summary judgment, and from
26 the grant of summary judgment in favor of the American Postal
27 Workers Union, by the United States District Court for the

1 * The Honorable Barbara S. Jones, of the United States
2 District Court for the Southern District of New York, sitting by
3 designation.

1 Southern District of New York (Alvin K. Hellerstein, Judge). The
2 court enjoined appellants from interfering with the display of
3 political materials on union bulletin boards in post offices on
4 the ground that the display of such materials is not prohibited
5 under the Hatch Act, 5 U.S.C. § 7321, et seq. Because the
6 display violates the Act and because appellees' constitutional
7 arguments are without merit, we reverse.

8
9 David J. Kennedy, Assistant United
10 States Attorney (Gideon A. Schor,
11 Assistant United States Attorney,
12 of counsel), for James B. Comey,
13 United States Attorney for the
14 Southern District of New York, New
15 York, New York, for Defendants-
16 Appellants.

17
18 Darryl Anderson (Peter J. Leff, of
19 counsel), O'Donnell, Schwartz &
20 Anderson, Washington, D.C., for
21 Plaintiffs-Appellees.

22
23 WINTER, Circuit Judge:

24 This action involves the questions of whether the 1939 Hatch
25 Act, as amended in 1993, 5 U.S.C. §§ 7321-7326, prohibits postal
26 workers from displaying political materials on union bulletin
27 boards in nonpublic areas of post offices, and, if so, whether
28 the Act is constitutional.

29 Various federal officials, the United States Office of
30 Personnel Management, and the United States Postal Service
31 ("USPS") (collectively the "government") appeal from Judge

1 Hellerstein's decision enjoining them from interfering with the
2 American Postal Workers Union ("APWU") display of political
3 materials on APWU bulletin boards. See Burrus v. Vegliante, 247
4 F. Supp. 2d 372 (S.D.N.Y. 2002). Because the postings in
5 question fall squarely within the activities proscribed by the
6 Hatch Act at 5 U.S.C. § 7324(a) and because there is no merit in
7 the APWU's constitutional arguments, we reverse.

8 BACKGROUND

9 The APWU represents approximately 350,000 USPS employees
10 nationwide. Article 22 of the national collective bargaining
11 agreement between the USPS and the APWU provides for APWU
12 bulletin boards in nonpublic postal workplaces, as follows:

13 The Employer shall furnish separate bulletin
14 boards for the exclusive use of the Union
15 party to this Agreement, subject to the
16 conditions stated herein, if space is
17 available. . . . Only suitable notices and
18 literature may be posted

19 According to the APWU, it has regularly used these bulletin
20 boards to make political endorsements by separate postings or
21 through a "News Service" that it regularly posts on the bulletin
22 boards.

23 In September and October, 2000, the APWU's Legislative
24 Department developed and distributed a poster comparing the
25 campaign positions and voting records of the Republican and
26 Democratic party presidential candidates on issues of concern to
27 the APWU and its membership. While the poster purported to

1 present only factual information, the APWU does not seriously
2 dispute that it was intended to generate support for Vice
3 President Gore.¹ (A representative excerpt from the poster is
4 set out in Appendix A.) However, the evidence is that the poster
5 was not produced in cooperation or coordination with the
6 Democratic party or presidential campaign.

7 After the posters were displayed on USPS bulletin boards in
8 some post offices, the United States Office of Special Counsel
9 ("OSC")² issued an advisory opinion to the USPS stating that the
10 posting violated the Hatch Act.³ The USPS thereafter instructed
11 managers at all postal facilities to remove the posters and
12 return them to APWU representatives.

13 On November 2, 2000, five days before the presidential
14 election, the APWU commenced the present action, seeking
15 declaratory and injunctive relief against removal of the posters
16 and any disciplinary actions to prevent involved employees. On
17 November 3, 2000, the district court enjoined the USPS from
18 ordering the removal of the posters and from disciplining the
19 USPS employees involved in the posting.

20 The government appealed and moved in this court for an
21 emergency stay of the district court's injunction pending appeal.
22 On November 3, 2000, we declined to grant an emergency stay and
23 set a hearing on the stay motion for November 14, 2000. On
24 November 8, 2000, the day after the 2000 presidential election,

1 the government withdrew its request for a stay but informed the
2 court that it would pursue its appeal. On December 3, 2001, a
3 panel of this court issued a summary order dismissing as moot the
4 government's appeal and noting that appellate review would be
5 available following resolution in the district court of the
6 APWU's request for a declaratory judgment and permanent
7 injunction. Biller v. Vegliante, 24 Fed. Appx. 73, 74-76 (2d
8 Cir. 2001) (unpublished summary order).

9 Following amended pleadings and a period of discovery, the
10 government moved, and the APWU cross-moved, for summary judgment.
11 On October 15, 2002, the district court filed an opinion and
12 order granting summary judgment in favor of the APWU. The
13 district court's opinion concluded:

14 I hold that the APWU is entitled to advocate
15 the election of candidates through display of
16 posters and like materials on designated
17 union bulletin boards in non-public areas of
18 post offices, so long as the display is not
19 coordinated with or in concert with a
20 political party or candidate, and that
21 defendants are enjoined from interfering with
22 the Union's displays, and from disciplining
23 postal employees who bring such posters and
24 refused [sic] to remove them.

25 Burrus, 247 F. Supp. 2d at 379.

26 The government again appealed, and the district court stayed
27 its order until 4:00 p.m. on October 22, 2002. In light of the
28 upcoming mid-term election, the government moved in this court
29 for a continuation of the stay, and we heard oral argument on

1 October 22, 2002. We granted the government's motion from the
2 bench, extending the stay of the district court's judgment and
3 setting an expedited briefing schedule for the government's
4 appeal. The appeal was fully briefed on October 28, 2002, and we
5 thereafter issued an order continuing the stay of the district
6 court's injunction until further order of this court to give us
7 time to prepare an opinion. We held that the government had
8 demonstrated a likelihood of success on the merits and that "the
9 completion of the election will not render the action moot in
10 light of a record demonstrating beyond peradventure that the
11 issue is capable of repetition and yet evading review."

12 For the reasons that follow, we reverse the judgment of the
13 district court and order entry of judgment for the government.

14 DISCUSSION

15 We review de novo both the grant of the APWU's motion for
16 summary judgment and the denial of the government's motion for
17 summary judgment. Scholastic, Inc. v. Harris, 259 F. 3d 73, 81
18 (2d Cir. 2001). The material facts are undisputed.

19 a) The Hatch Act

20 We begin with a description of the Hatch Act, 5 U.S.C.
21 §§ 7321-7326, and its history. The Act limits the political
22 activities of federal employees in the interests of promoting
23 efficient, merit-based advancement, avoiding the appearance of
24 politically-driven justice, preventing the coercion of government

1 workers to support political positions, and foreclosing use of
2 the civil service to build political machines. See Burrus, 247
3 F. Supp. 2d at 375 (citing United States Civil Serv. Comm'n v.
4 Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 565-66 (1973);
5 Biller v. United States Merit Sys. Prot. Bd., 863 F.2d 1079, 1089
6 (2d Cir. 1988)).

7 Prior to its amendment in 1993, the Act imposed a broad
8 prohibition on political activities by federal employees. See
9 generally S. Rep. No. 103-57, at 2-3 (1993), reprinted in 1993
10 U.S.C.C.A.N. 1802, 1803-04. In addition to prohibiting federal
11 employees from using their official authority to influence
12 elections, prior to the 1993 Hatch Act Reforms, Section 7324
13 prohibited federal employees from at any time taking "an active
14 part in political management or in political campaigns."⁴ See
15 id. at 1804-05. By 1993, concern over using the civil service as
16 a source of political patronage had subsided, and Congress passed
17 the Hatch Act Reform Amendments. These amendments restored, with
18 limited exceptions for employees in certain sensitive positions,
19 the rights of federal employees to "take an active part in
20 political management or in political campaigns" while off-the-
21 job, but retained and strengthened prohibitions against
22 "political activity" while on duty or at the workplace. See id.
23 at 1803.

24 Amendments to the former Section 7324, see Note 4, supra,

1 were placed in a new Section 7323, and a new Section 7324 was
2 added, see 5 U.S.C. §§ 7323-7324. These two new sections are set
3 out in their entirety in Appendix B to this opinion. The
4 restrictions on political activity imposed by the new Sections
5 7323 and 7324, as modified by the Hatch Act Reforms, are of two
6 distinct categories: (i) new Section 7323 sets out general
7 prohibitions -- not limited by time or place -- on certain kinds
8 of political activity, and (ii) new Section 7324 defines specific
9 on-the-job circumstances in which all political activity is
10 prohibited.

11 The general prohibitions of Section 7323 include a ban on
12 federal employees using official authority to affect an election
13 or to affect the political activity of those subject to
14 government authority, Section 7323(a)(1), (4), engaging in
15 political fundraising, Section 7323(a)(2), and running for
16 partison political office, Section 7323(a)(3). Also prohibited
17 are the giving or receiving of political contributions by members
18 of the Federal Election Commission, Section 7323(b)(1), and the
19 taking of "an active part in political management or political
20 campaigns" by employees of certain specified federal agencies
21 (not including the USPS), Section 7323(b)(2), (3). Section
22 7323(a) provides that with the exception of those employees
23 specified in Section 7323(b), employees "may take an active part
24 in political management or in political campaigns" -- a

1 substantial relaxation of the previous limits on political
2 activities for most federal employees. Section 7323(a) (emphasis
3 added). Also, Section 7323(c) provides that "[a]n employee
4 retains the right to vote as he chooses and to express his
5 opinion on political subjects and candidates."

6 As noted, whereas the new Section 7323's provisions are not
7 limited by time or place, the new Section 7324 concerns on-the-
8 job activities and is the dispositive provision regarding the
9 issues in this case. The new Section 7324 prohibits federal
10 employees from engaging in "political activity": (i) while on
11 duty, Section 7324(a)(1); (ii) "in any room or building occupied
12 in the discharge of official duties by an individual employed or
13 holding office in the [federal government]," Section 7324(a)(2);
14 (iii) in government uniform, Section 7324(a)(3); or (iv) while
15 using a government vehicle, Section 7324(a)(4). While the Hatch
16 Act does not itself define "political activity" for purposes of
17 Section 7324, the Office of Personnel Management's implementing
18 regulations, enacted in July 1996, provide the following
19 definition:

20 Political activity means an activity directed
21 toward the success or failure of a political
22 party, candidate for partisan political
23 office, or partisan political group.
24

25 5 C.F.R. § 734.101. The regulations contain examples of
26 prohibited conduct under the Hatch Act. In particular, a covered
27 employee:

1 may not wear partisan political buttons or
2 display partisan political pictures, signs,
3 stickers, or badges while he or she is on
4 duty or at his or her place of work.

5
6 5 C.F.R. § 734.306 (Example 16).

7 b) Application to the Postings

8 The APWU has conceded that "[f]ederal employees on active
9 duty were among the individuals who posted and/or displayed the
10 poster on bulletin boards in United States Post Offices."⁵ See
11 APWU Response to Request for Admissions, J.A. at 388. This
12 conduct falls squarely and unambiguously within the prohibition
13 of new Section 7324(a)(2), which provides that:

14 An employee may not engage in political
15 activity--

16 * * * * *

17
18 (2) in any room or building occupied in the
19 discharge of official duties by an
20 individual employed or holding office in
21 the Government of the United States or
22 any agency or instrumentality thereof
23

24
25 5 U.S.C. § 7324(a)(2).

26 The APWU argues -- and the district court agreed -- that the
27 display of the posters does not constitute "political activity"
28 within the meaning of the Hatch Act because the new Section
29 7324's term "political activity," like Section 7323's term
30 "active part in political management or in political campaigns,"
31 refers only to activity "coordinated with or in concert with a
32 political party or candidate," see Burrus, 247 F. Supp. 2d at

1 375-76, 379. However, the term "political activity" is broader
2 than the quoted language in Section 7323 and does not imply that
3 the particular conduct be in concert with a candidate's campaign
4 or party. The language of the statute is plain.

5 Moreover, the pertinent regulations define political
6 activity in a way that clearly includes the APWU poster. That
7 definition covers any and all activity "directed toward the
8 success or failure of a political . . . candidate," 5 C.F.R.
9 § 734.101, and clearly reaches the poster. Indeed, one of the
10 illustrative examples provided in the regulation includes an
11 employee's "display [of] partisan political . . . signs . . . at
12 his or her place of work," 5 C.F.R. § 734.306 (Example 16).

13 In concluding otherwise, the district court relied upon our
14 decision in Biller v. United States Merit Systems Protection
15 Board, 863 F.2d 1079 (2d Cir. 1988). However, Biller involved an
16 interpretation of the pre-1993 Hatch Act, in particular the pre-
17 1993 Section 7324. As noted, that Section provided that no
18 employee may "take an active part in political management or in
19 political campaigns," which Biller reasonably interpreted as
20 requiring conduct in concert with political candidates or
21 parties. 863 F.2d at 1090. New Section 7324's term "political
22 activity" was not used in any relevant provision of the pre-1993
23 Hatch Act, but did appear in the pre-1993 implementing
24 regulations. As used in those regulations, "political activity"

1 included a vast range of activities, only a few of which were in
2 concert with campaigns or parties. Title 5 C.F.R. § 733.111(a)
3 provided, in part, as follows:

4 (a) All employees are free to engage in
5 political activity to the widest extent
6 consistent with the restrictions imposed
7 by law and this subpart. Each employee
8 retains the right to --
9

- 10 (1) Register and vote in any election;
- 11 (2) Express his opinion as an
12 individual privately and publicly
13 on political subjects and
14 candidates;
- 15 (3) Display a political picture,
16 sticker, badge, or button;
- 17 (4) Participate in the nonpartisan
18 activities of a civic, community,
19 social, labor, or professional
20 organization, or of a similar
21 organization;
- 22 (5) Be a member of a political party or
23 other political organization and
24 participate in its activities to
25 the extent consistent with law;
- 26 (6) Attend a political convention,
27 rally, fund-raising function; or
28 other political gathering;
- 29 (7) Sign a political petition as an
30 individual;
- 31 (8) Make a financial contribution to a
32 political party or organization;

33 . . .

34 (b) Paragraph (a) of this section does not
35 authorize an employee to engage in
36 political activity in violation of law,
37 while on duty, or while in a uniform
38 that identifies him as an employee.

39 Biller, 863 F.2d at 1083 n.1 (setting out 5 C.F.R. § 733.111(a)).

40 This list demonstrates beyond any doubt that, before 1993, the
41 term "political activity," in the Hatch Act context, included

1 many activities other than the prohibited active participation in
2 political management or in political campaigns addressed by
3 Biller.

4 The district court attached no significance to this
5 informative prior definition of the term "political activity."
6 Rather, it assumed tacitly that the phrase "engage in political
7 activity" in Section 7324(a) has the same meaning as the phrase
8 "take an active part in political management or in political
9 campaigns" in Section 7323. It described this approach as
10 reading Section 7324 "consistently with Section 7323[.]" Burrus,
11 247 F. Supp. 2d at 376. However, had Congress intended the new
12 Section 7324 to apply to the same activity addressed by the new
13 Section 7323, we are confident that it would have used the same
14 words. See United States v. Wilson, 290 F.3d 347, 360 (D.C. Cir.
15 2002) ("Where the words of a later statute differ from those of a
16 previous one on the same or related subject, the Congress must
17 have intended them to have a different meaning." (quoting
18 Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir.
19 1988) (internal citation omitted))).

20 Finally, even if there were some lurking ambiguity in the
21 term "political activity," the view that Section 7324 places
22 broad prohibitions on on-the-job and at-the-workplace conduct is
23 entirely consistent with the legislative history of the enactment
24 of Section 7324. The Senate Report characterizes the 1993 Hatch

1 Act Reform Amendments as follows:

2 [The amendment] would retain and strengthen
3 current law prohibitions against political
4 activity "on-the-clock"--on Government time
5 and in Government premises. It would broaden
6 the current law to also provide Federal
7 civilian and postal employees the opportunity
8 to participate voluntarily in political
9 activities as private citizens "off-the-
10 clock"

11 S. Rep. No. 103-57, at 2 (1993), reprinted in 1993 U.S.C.C.A.N.
12 1802, 1803; see also H.R. Rep. No. 103-16 (1993), available at
13 1993 WL 46758, at *15 (stating that the 1993 Amendments are
14 "grounded in the concept that Federal employees should be free to
15 engage in political activities on their own time but should not
16 engage in any political activity on the job"). The Senate report
17 goes on to state, specifically with regard to Section 7324, that
18 "[p]olitics on the job, including the wearing of political
19 buttons, is prohibited." S. Rep. No. 103-57, at 14 (1993),
20 reprinted in 1993 U.S.C.C.A.N. 1802, 1815) (emphasis added).

21 This construction of the on-the-job political activity
22 proscribed by the amended Hatch Act was echoed in the comments of
23 many members of Congress, as well as the President. For example,
24 Senator Glenn, a sponsor of the 1993 amendments and the manager
25 of the bill as Chairman of the Senate Committee on Governmental
26 Affairs, stated as follows:

27 [W]hat we do by this legislation is we say
28 basically that on the job -- on the job -- we
29 tighten up the Hatch Act. We strengthen
30 current prohibitions against on-the-job

1 political activity by Government employees.
2 We beef up penalties for violators such as I
3 just read. And we say there will be no
4 political activity on the job. There are no
5 exceptions to that. There will be no
6 political activity of any kind on the job.
7

8 How about off the job? Now, we say,
9 still with major restrictions, major
10 controls, that off the job we should allow
11 America's 2.5 to 3 million civil servants to
12 reclaim their constitutional rights by
13 participating in our Nation's political
14 process, voluntarily, on their own time, as
15 private citizens

16 139 Cong. Rec. 15,739 (July 15, 1993) (statement of Sen. Glenn)
17 (emphasis added); see also 139 Cong. Rec. 15,366 (July 13, 1993)
18 (statement of Sen. Glenn) ("[N]o political activity on the job,
19 zero, including even what is permitted under today's Hatch
20 Act."). When signing the amendments into law, President Clinton
21 echoed this understanding:

22 While employees will now be entitled to
23 volunteer on their own time for the candidate
24 of their choice, all political activity in
25 the Federal workplace will be prohibited,
26 including the wearing of campaign buttons.

27 Statement of President Clinton (Oct. 6, 1993), reprinted in 1993
28 U.S.C.C.A.N. 1843, 1843.⁶

29 Therefore, the APWU posting is: (i) within the term
30 "political activity"; (ii) within the applicable regulations
31 defining that term; (iii) within the understanding of the meaning
32 of "political activity" that existed at the time of the 1993
33 amendment (displaying "a political picture, sticker, badge, or

1 button"), see Biller 863 F.2d at 1083 n.1 (citing 5 C.F.R. §
2 733.111(a)(3)); and (iv) within Congress' understanding of the
3 activity it intended to prohibit ("[N]o political activity on the
4 job, zero, including even what is permitted under today's [pre-
5 1993] Hatch Act," 139 Cong. Rec. 15,366 (July 13, 1993)
6 (statement of Sen. Glenn)).

7 The district court also suggested that, even if displaying
8 the posters constituted "political activity" for purposes of
9 Section 7324, it would still fall outside that Section's
10 prohibitions because it did not involve "interference with
11 official 'duty,'" or "appropriation of a 'room or building
12 occupied in the discharge of official duties.'" See Burrus, 247
13 F. Supp. 2d at 377. However, the prohibitions of the new Section
14 7324 do not turn on a showing of "interference" with duty or
15 "appropriation" of workplace rooms or buildings. The Section
16 requires only that an employee be "on duty," Section 7324(a)(1),
17 or be "in any room or building occupied in the discharge of
18 official duties by [a government employee]," Section 7324(a)(2).

19 Therefore, we also disagree with the district court's
20 further implication that Section 7324(a)(1) and (2) prohibits
21 political activity by an employee only while "on duty" or "in the
22 discharge of official duties." Burrus, 247 F. Supp. 2d at 376-
23 77. Rather, the statutory text prohibits political activity
24 while either on duty or in a room or building occupied in the

1 discharge of official duties by any government employee. See
2 5 U.S.C. § 7324(a).

3 Finally, the district court stated that Section 7323(c),
4 which provides that an employee "retains the right to . . .
5 express his opinion on political subjects and candidates,"
6 exempts the display of the posters from attack under Section
7 7324. See Burrus, 247 F. Supp. 2d at 376-77; Appellees' Br. at
8 35. We disagree. Section 7323(c) qualifies only the off-the-job
9 active participation prohibitions contained in Section 7323(b)
10 and the prohibitions on official coercion in Section 7323(a).

11 For example, although an employee of a politically sensitive
12 agency may not at any time actively participate in a political
13 campaign, he or she remains free under Section 7323(c) to vote
14 and to express opinions. In other words, Section 7323(c) defines
15 permitted passive and noncoercive conduct under Section 7323. As
16 noted, Section 7324 is a more particularized provision, dealing
17 not with overall conduct, but with conduct on the job or at the
18 workplace. Indeed, if Section 7323(c) gives employees the right
19 to express opinions on political subjects under all
20 circumstances, then Section 7324 has little effect. Where
21 possible we avoid construing a statute so as to render a
22 provision mere surplusage. See, e.g., New York v. Shore Realty
23 Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

24 c) Constitutional Claims

1 APWU's constitutional claims are also without merit.

2 The argument that the Hatch Act is impermissibly vague must
3 be rejected in light of United States Civil Service Commission v.
4 National Association of Letter Carriers, 413 U.S. 548 (1973), in
5 which the Supreme Court held that the pre-1993 version of the
6 Hatch Act was not excessively vague because of the implementing
7 regulations providing and the availability of, advisory opinions.
8 Id. at 575-80 & n.21. The meaning of "political activity" under
9 the new Section 7324 is amply elaborated by definition and
10 examples in the current regulations, 5 C.F.R. § 734.101, 734.306,
11 and an advisory opinion is available (but was not sought by APWU)
12 from the OSC, see 5 C.F.R. § 734.102(a).

13 APWU also argues that the APWU bulletin boards are limited
14 public fora under the First Amendment. However, interior work
15 areas of post offices are nonpublic fora. See Longo v. United
16 States Postal Service, 983 F.2d 9, 11 (2d Cir. 1992). Moreover,
17 these work areas and bulletin boards are open only to the union,
18 and then only with respect to "suitable notices and literature,"
19 see J.A. 44, which by any definition surely excludes material
20 posted in violation of federal law.

21 Government regulation of speech in a nonpublic forum "need
22 only be reasonable in light of the purpose of the forum and
23 reflect a legitimate government concern," Gen. Media
24 Communications, Inc. v. Cohen, 131 F.3d 273, 282 (2d Cir. 1997)

1 (internal citation omitted), and the Hatch Act easily passes that
2 test. See, e.g., United States v. Nat'l Treasury Employees
3 Union, 513 U.S. 454, 476 n.21 (1995) (describing the Hatch Act's
4 employee-protective rationale as "much stronger justification for
5 a proscriptive rule than . . . the Government's interest in
6 workplace efficiency"); United Pub. Workers v. Mitchell, 330 U.S.
7 75, 100 (1947) ("Congress may reasonably desire to limit party
8 activity of federal employees so as to avoid a tendency toward a
9 one-party system.").

10 We have reviewed the APWU's remaining arguments and find
11 them to be without merit.

12 CONCLUSION

13 For the foregoing reasons, we reverse the judgment of the
14 district court and remand with instructions to grant summary
judgment in favor of the government.

Appendix A

Which Candidates for President and Vice President Will Stand Up for YOU?

This is a critical election for postal workers and our families. We must decide: which candidates will stand up for us? Which ones will help us fight to preserve our jobs? Which ones will do the best job at preserving Social Security benefits? Take a look at their records and positions on the issues and decide for yourself.

The Presidential Candidates	AL GORE	GEORGE W. BUSH
Privatization of the Postal Service	Supports APWU's fight to protect USPS jobs from privatization.	Generally favors privatization of government services.
Raise Minimum Wages	Favors raising minimum wage.	Opposed minimum wage increases as governor.
Union Members' Involvement in Politics	Opposes "paycheck deception" initiatives to limit union members' political activity.	Supports "paycheck deception."
Equal Pay for Equal Work	Supports equal pay, pushed for inclusion of \$14 million in pay equity efforts in FY 2000 budget.	No position.
Social Security	Would protect current guaranteed Social Security benefits, add increased benefits.	Would divert funds from Social Security into individual stock market accounts, requiring cuts in guaranteed benefits.
Raising Retirement Age to Collect Social Security Benefits	Opposes.	Would consider.

APPENDIX B

§ 7323. Political activity authorized; prohibitions

- (a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not--
 - (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election;
 - (2) knowingly solicit, accept, or receive a political contribution from any person, unless such person is--
 - (A) a member of the same Federal labor organization as defined under section 7103(4) of this title or a Federal employee organization which as of the date of enactment of the Hatch Act Reform Amendments of 1993 [enacted Oct. 6, 1993] had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4)));
 - (B) not a subordinate employee; and
 - (C) the solicitation is for a contribution to the multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))) of such Federal labor organization as defined under section 7103(4) of this title or a Federal employee organization which as of the date of the enactment of the Hatch Act Reform Amendments of 1993 [enacted Oct. 6, 1993] had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))); or
 - (3) run for the nomination or as a candidate for election to a partisan political office; or
 - (4) knowingly solicit or discourage the participation in any political activity of any person who--
 - (A) has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employing office of such employee; or
 - (B) is the subject of or a participant in an ongoing audit, investigation, or enforcement action being carried out by the employing office of such employee.
- (b)
 - (1) An employee of the Federal Election Commission (except one appointed by the President, by and with the advice and consent of the Senate), may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.
 - (2)
 - (A) No employee described under subparagraph (B) (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns.
 - (B) The provisions of subparagraph (A) shall apply to--
 - (i) an employee of--
 - (I) the Federal Election Commission;
 - (II) the Federal Bureau of Investigation;
 - (III) the Secret Service;
 - (IV) the Central Intelligence Agency;
 - (V) the National Security Council;
 - (VI) the National Security Agency;
 - (VII) the Defense Intelligence Agency;

- (VIII) the Merit Systems Protection Board;
 - (IX) the Office of Special Counsel;
 - (X) the Office of Criminal Investigation of the Internal Revenue Service;
 - (XI) the Office of Investigative Programs of the United States Customs Service;
 - (XII) the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms; or
 - (XIII) the National Imagery and Mapping Agency; or
 - (ii) a person employed in a position described under section 3132(a)(4), 5372, 5372a, or 5372b of title 5, United States Code.
 - (3) No employee of the Criminal Division of the Department of Justice (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns.
 - (4) For purposes of this subsection, the term "active part in political management or in a political campaign" means those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.
- (c) An employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

§ 7324. Political activities on duty; prohibition

- (a) An employee may not engage in political activity--
- (1) while the employee is on duty;
 - (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
 - (3) while wearing a uniform or official insignia identifying the office or position of the employee; or
 - (4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.
- (b)
- (1) An employee described in paragraph (2) of this subsection may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.
 - (2) Paragraph (1) applies to an employee--
 - (A) the duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and
 - (B) who is--
 - (i) an employee paid from an appropriation for the Executive Office of the President; or
 - (ii) an employee appointed by the President, by and with the advice and consent of the Senate, whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.

FOOTNOTES

1. At one point, the district court at oral argument described the poster as being "as political as you could imagine." J.A. at 98 (Tr. of 11/03/00, at 12).

2. The United States Office of Special Counsel ("OSC") is an independent federal investigative and prosecutorial agency. Its functions and powers are found in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, and the Hatch Act, as amended in 1993, Pub. L. No. 103-94, 107 Stat. 1001. With regard to the Hatch Act, the OSC promotes compliance by providing advisory opinions on, and enforcing, the Act. See "Introduction to the OSC," available at <http://www.osc.gov/intro.htm> (last modified 06/02/03).

3. The October 26, 2000 OSC opinion states in part as follows:

The Hatch Act (5 U.S.C. §§ 7321-7326) generally permits most federal employees, including United States Postal Employees, to actively participate in partisan political management and partisan political campaigns. Covered employees, however, are prohibited from engaging in political activity while on duty, in a government office or building, while wearing an official uniform, or using a government vehicle. See 5 U.S.C. § 7324.

Political activity has been defined as activity directed toward the success or failure of a political party, candidate for a

partisan political office or partisan political group. 5 C.F.R. § 734.101. Therefore, covered employees are prohibited, among other things, from displaying or posting partisan political posters or partisan candidates' position statements in government offices or buildings, including union space and bulletin boards.

J.A. at 47 (Letter from William E. Reukauf, Associate Special Counsel for Prosecution, to Court Wheeler, Attorney, United States Postal Service, of 10/26/00).

4. Section 7324 of the pre-1993 Hatch Act provided as follows:

- (a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not --

. . .

- (2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

- (b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

5 U.S.C. § 7324 (1990).

5. The APWU claims on appeal that some of the postings were performed by retired Postal Service employees, whose actions are outside the scope of Section 7324 because they are not "employees" as defined by the Hatch Act. However, the bulletin boards are controlled by the APWU, which is an agent of the active employees, and its use for "political activity" must be deemed to be an act of those employees. Otherwise, the prohibitions of the Hatch Act could be routinely evaded by the use of agents of current employees to perform proscribed political activities.

6. The district court and appellees rely heavily on a House Committee Report that states as follows on the subject of union bulletin boards:

13. Union bulletin boards

Currently, many Federal agencies make bulletin boards available to Federal employee unions on which items of interest to the union members may be posted. One of the items usually posted on these bulletin boards is the union newsletter. Frequently, union newsletters contain a solicitation for members to contribute to the political committee of the union. An overly literal reading of [the proposed Hatch Act amendments] might hold that posting such a newsletter would be a violation of section 7323(a)(4)(B), concerning solicitations in Federal buildings, or section 7325(a)(2), concerning engaging in political activities in a Federal building. The committee does not intend that this legislation be construed

in such a manner. Rather, the committee intends that the posting of union newsletters on bulletin boards, which has been allowed under existing law, continue to be allowed. Moreover, the distribution of union newsletters in a Federal building should continue to be permitted. On the other hand, direct person-to-person solicitations of funds at the worksite or on duty time is clearly prohibited.

H.R. Rep. No. 103-16, at 19 (1993) (cited at Burrus, 247 F. Supp. 2d at 378; Appellees' Br. at 23-24). Because the above passage deals with the solicitation of contributions to a general political committee of the union, and not with the endorsement of a candidate for partisan political office (more clearly an instance of "political activity"), it has little bearing on this dispute. We need not decide now whether the display in the workplace of a poster or newsletter soliciting contributions to a union's general political committee would constitute prohibited "political activity."